ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States	)	IB Docket No. 96-111
	)	
and	)	
	)	
Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations	)	CC Docket No. 93-23 RM-7931
	)	
and	)	
	)	
COMMUNICATIONS SATELLITE CORPORATION Request for Waiver of Section 25.131(j)(1) of the Commission's Rules As It Applies to Services Provided via the Intelsat K Satellite	)	File No. ISP-92-007

COMMENTS OF ICO GLOBAL COMMUNICATIONS

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TABLE OF CONTENTS

SUMMARY

Global mobile satellite services ("MSS") are an innovative, advanced form of communications services that will allow users to communicate from anywhere to anywhere in the world. MSS will expand telecommunications coverage to areas now unreachable or underserved by conventional fixed or mobile systems, thus creating the truly global telecommunications infrastructure that the current Administration champions.

ICO was formed specifically to provide MSS on a global basis. Since its inception, ICO consistently has advocated the position that open, competitive, and non-discriminatory market access for all MSS operators will best serve the public interest by producing high quality satellite services at the lowest possible costs. In keeping with this philosophy, ICO has supported the efforts of the United States and other countries of the World Trade Organization ("WTO") to reach an agreement on the liberalization of international telecommunications markets.

ICO supports the Commission's tentative conclusion that non-U.S.-licensed space stations need not obtain licenses from the United States. The Commission's proposal to regulate non-U.S.-licensed MSS systems through the licensing of earth stations that communicate with those satellites will provide the Commission with sufficient oversight of MSS systems.

ICO is strongly opposed, however, to the Commission's proposal to apply an ECO-Sat test to MSS, either on a route-by-route or on a "critical mass" basis. The proposed test directly contradicts the United States' pro-competitive, pro-open market access position in the WTO-sponsored multilateral negotiations concerning

telecommunications and is counter to the FCC's contention that all MSS systems are inherently global, rather than national flag carriers. The proposed critical mass test also violates the standstill provision agreed to by the participants of these multilateral negotiations, and its adoption could seriously hinder the participants' continuing efforts to reach agreement on market access.

The proposed critical mass test is not pro-competitive because it would result in less, rather than more, competition in the provision of MSS. Under the test, an MSS operator would be precluded from serving the U.S. if it could not prove that even *one* critical mass country does not offer U.S.-licensed MSS systems competitive opportunities. In many instances, for reasons beyond their control, it will be difficult, if not impossible, for non-U.S.-licensed MSS operators to make the requisite showing regarding open access. Most, therefore, will fail the test and be precluded from serving the United States. At a minimum, the critical mass test will subject non-U.S.-licensed MSS systems to unnecessary delay in implementing services. The practical effect of the test, then, will be to insulate U.S.-licensed MSS operators from the very competition that the Commission espouses.

Nor will the critical mass test serve to encourage other countries to open their markets, as the Commission intends. The trend in many countries already is toward competition, especially with respect to mobile services. Because MSS is essentially a cellular extension, there is every reason to believe that these countries will similarly desire a competitive MSS market.

The proposed critical mass test is flawed in a number of other ways. First, it arbitrarily distinguishes between U.S.-licensed MSS operators and non-U.S.-licensed operators and encumbers the latter with a regulatory obstacle not faced by the former. This discriminatory treatment of non-U.S.-licensed MSS operators is entirely unwarranted given that all MSS systems are similar in terms of their international characteristics. This similarity is not surprising given the inherently international nature of MSS systems. All MSS operators, regardless of their home country, must secure international partners and service providers that will assist in securing authorizations in the foreign countries the MSS operator intends to serve.

A look at the MSS operators in existence today evidences this point. Globalstar and Iridium, and to a lesser degree Odyssey, all, like ICO, have numerous foreign investors and service providers with whom they have affiliated. For the Commission to apply its critical mass test in effect, to one company – ICO – but not to the others solely because ICO's space station is not licensed by the United States is illogical. ICO is no more "foreign" than Globalstar, Iridium and Odyssey. Likewise, Globalstar, Iridium and Odyssey are no more "domestic" than ICO.

Second, the "all or nothing" aspect of the test constitutes regulatory overkill. Under the test, an MSS operator would be precluded from providing service between the U.S. and all countries if it fails to prove that a critical mass country does not offer U.S.-licensed systems competitive opportunities. As a result, there will be less competition on routes that are open to U.S. satellites, because of the fact that other markets are closed. In other words, some countries will be punished because of the "sins" of others. Ultimately,

the greatest harm to the public interest will result when consumers are denied the right to choose among the full range of MSS providers that would be available in a fully competitive global market.

Third, it is not clear how the Commission would determine which countries are relevant to a critical mass test and which are not. A critical mass test, regardless of how it is defined, would be an entirely arbitrary selection of countries.

Fourth, obtaining the requisite proof that other countries afford U.S.-licensed satellite operators open access could be difficult, if not impossible. To date, many countries have yet to adopt regulatory schemes for MSS, despite giving strong indications of welcoming global MSS systems and encouraging local partnership arrangements. With respect to these countries, non-U.S.-licensed MSS operators may, nevertheless, have difficulty proving open access.

Finally, application of the proposed ECO-Sat test would cause the Commission impermissibly to infringe on the jurisdiction of the Executive Branch over trade policy. In at least two proceedings in the past, the Commission has concluded that it lacks the authority to adopt reciprocity standards similar to the ECO-Sat test. Regardless of how the Commission may characterize it, the ECO-Sat test is a reciprocity test. Accordingly, if it were to apply the test, the Commission would be usurping the authority of the Executive Branch over trade policy matters.

The Commission can better promote the public interest by abandoning its proposed ECO-Sat test for MSS. ICO urges that the Commission instead place all global MSS operators on equal competitive footing by encouraging other countries to impose on

their MSS operators a "no special concessions" condition similar to that imposed by the FCC on U.S.-licensed MSS operators. The current language contained in the condition should be expanded to prohibit the licensee from acquiring or enjoying special arrangements that unfairly disadvantage *any* competing satellite operator, whether licensed by the United States or another country.

If implemented multilaterally, this approach would establish regulatory parity for all MSS operators by ensuring that no MSS operator enjoys special concessions over any other operator in any country. Such an approach would be consistent with the United States' position with respect to market access and would best serve the Commission's stated goal of "enhancing competition in the global market for satellite services."

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COMMENTS OF ICO GLOBAL COMMUNICATIONS

ICO Global Communications ("ICO") hereby responds to the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rule Making in the above captioned proceeding[1] seeking comment on the Commission's proposal to establish a uniform framework for evaluating applications by users in the United States for authority to access

[1] *See Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, Notice of Proposed Rule Making, IB Docket No. 96-111, FCC 96-210 (May 14, 1996) ("NPRM").

satellites licensed by other countries via U.S.-licensed earth stations. The Commission tentatively proposes that non-U.S.-licensed satellite systems be allowed to provide services to, from, or within the United States to the extent that foreign markets allow effective competitive opportunities for U.S.-licensed satellite systems to provide analogous services.

With respect to mobile satellite services ("MSS"), the Commission proposes to require that a "critical mass" of foreign markets be open to U.S.-licensed satellites before a non-U.S.-licensed MSS system may provide *any* service in the United States.[2] ICO strongly opposes this proposal and suggests an alternative approach for ensuring that the international market for global MSS is competitive, open, and fair and that national licensing schemes for global MSS operators offer regulatory parity.

The public interest will be best served by vigorous competition among multiple MSS operators and ICO believes that its proposal, rather than the Commission's "critical mass" test, would most successfully foster such competition. If adopted, the "critical mass" analysis likely would reduce competition in the MSS market — to the detriment of U.S. consumers and business — by hindering, if not precluding, the development of non-U.S.-licensed MSS systems. Rather than handicap non-U.S.-licensed MSS operators *vis-a-vis* their U.S.-licensed competitors, the Commission should ensure regulatory parity for all MSS operators. Such an approach would be more in keeping with stated U.S. international telecommunications policy goals.

Mobile satellite services are advanced and unique offerings that will provide substantial benefits to end users in the United States and around the world.[3] In a speech before the G-7

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[2] *See* NPRM at ¶ 47.

[3] *See, e.g.*, Contribution of the United States of America, ITU World Telecommunications Policy Forum, at 2 ("Satellite systems offer great promise for all countries, and can provide economical, reliable, high quality modern telecommunications around the world.") ("*U.S. Policy Forum Contribution*").

Ministers Meeting on the Global Information Initiative, U.S. Vice President Albert Gore cited MSS as an example of technology and human imagination providing new communications capabilities:

> Take, for example, non-geostationary satellites. They hold remarkable potential, especially for remote or thinly-populated regions, and for societies eager to reap the benefits of 21st century technology even before completing expensive land-based networks. These advanced technologies can provide everything from basic telephone calls to remote medical diagnosis. Like the Internet, they have the potential to knit together millions of people in different locations and situations — and do it economically.[4]

MSS systems will enable users to call and be called at virtually any point on earth. This unique characteristic will allow MSS systems to provide mobile telecommunications coverage to areas currently unreachable or underserved by conventional fixed or mobile systems. In addition to the improvements MSS will bring to the world's information infrastructure, global MSS will produce substantial economic benefits to countries around the globe, including the United States.

I. INTRODUCTION

A. Overview Of ICO System

ICO was organized in 1995 to develop, launch, and operate a global MSS system that will permit customers to communicate from anywhere to anywhere on the globe. The ICO system will comprise ten operational satellites and two in-orbit spares operating in intermediate circular orbit to provide complete, continuous, overlapping coverage of the Earth's surface. In October 1995, Hughes Space & Communications International Inc. ("Hughes") joined ICO as a strategic partner and will design, develop, and manufacture the satellites and associated telemetry,

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[4] Remarks by Vice President Albert Gore to G-7 Ministers Meeting on the Global Information Initiative, Brussels, Belgium (Feb. 25, 1995) ("*Gore G-7 Remarks*").

tracking, and control equipment for the ICO system. Hughes also will supply and manage launch services for ICO. The cumulative value of the contracts between ICO and Hughes exceeds $2 billion.

The ICO system will support dual-mode cellular/satellite end-user terminals capable of delivering voice, fax, and data services to: (1) both domestic and international travelers roaming outside compatible cellular coverage areas; (2) satellite-only users; (3) general aviation aircraft and small vessels; and (4) semi-fixed installations in rural and remote areas. ICO will own and operate the system's space segment subject to the jurisdiction and regulatory requirements of the United Kingdom, which imposes detailed due diligence and competency requirements through both the Radiocommunications Agency and the British National Space Centre in a manner analogous to U.S. licensing procedures. The United Kingdom is also the notifying administration for ICO's satellite network for International Telecommunication Union ("ITU") coordination purposes.

On the ground, the ICO system will utilize earth stations or satellite access nodes ("SANs") located around the globe. The SANs will provide the primary interface with the ICO satellites for routing traffic and maintaining certain subscriber data. The SANs will also link with gateways that will serve as the primary interface with public switched telephone, mobile, and data networks. ICO expects to place at least one SAN within the United States.

The market for global MSS services is expected to exceed many millions of subscribers and billions of dollars of revenues by the year 2010. ICO has identified a wide range of potential MSS end user groups, including international business travelers, government and emergency personnel, and residents of rural and remote areas lacking adequate local telecommunications

infrastructure. In addition to ICO, the global MSS market will include a number of competitors vying for their share of the market. ICO's competitors likely will include the three so-called Big LEO operators recently licensed by the United States to provide similar global MSS. ICO does not plan to serve end users directly in the United States, but instead plans to provide services to consumers through a distribution chain of national wholesalers, retailers, and franchisees. Ultimately, ICO services will be delivered through retailers that likely would qualify in the United States as commercial mobile radio services ("CMRS") providers.

B. ICO Supports Open, Competitive And Non-Discriminatory Market Access

ICO's strong advocacy of open, competitive, and non-discriminatory market access for itself and its competitors accords with U.S. efforts in various international fora to ensure fair market access in international telecommunications. In submissions to numerous fora, including the FCC's Satellite Roundtable Meeting, the World Telecommunications Advisory Council, and the ITU World Telecommunications Policy Forum ("ITU Policy Forum") to be held in October in Geneva, Switzerland to consider issues relating to global mobile personal communications systems, ICO has advocated: (1) a "level playing field" to foster fair competition among global MSS operators around the world; (2) open access for new services such as MSS; (3) "light-handed" regulatory rules and practices for MSS; and (4) transparent regulatory policies and practices.[5] In addition to its own efforts to advance these principles both in the United States and

[5] *See Contribution Paper by ICO to the First World Telecommunications Policy Forum of the International Telecommunication Union*, Geneva (Oct. 21-23, 1996) at 5-6.

internationally,[6] ICO is working with other MSS operators to foster an international regulatory environment that is open, non-discriminatory, and competitive.

The United States has advocated the same approach, arguing that open market access for global MSS systems is the best means for ensuring that end users enjoy the maximum benefit of the innovative services these systems will provide. In its contribution to the ITU Policy Forum the United States adopts the following position:

> There must be open access to the provision of space services, subject only to spectrum availability and other limited resource factors. There should be competition among space systems and multiple service providers within each country in order to ensure lower costs and a broad choice of services for users. There should be a level playing field for all systems, and fair and commercially reasonable access to connecting facilities including non-discriminatory access to the public switched network.[7]

ICO supports open market access policies in the belief that vigorous competition among MSS operators will best serve the public interest by producing high quality satellite services at the lowest possible cost. Consistent with this philosophy, ICO strongly supports the continued efforts of the United States and numerous other member countries of the World Trade Organization ("WTO") to reach an agreement on the liberalization of international telecommunications markets without political or protectionist obstacles:

> It is key to our success that the World Trade Organization achieves its aim of agreeing to a truly liberalized telecommunications market at the revised deadline of February next year. Exclusion or partial agreements will ultimately harm those countries who wish to maintain national measures. They only lead to inefficiencies and higher costs to their own domestic consumers. On the other hand, a healthy domestic market which is

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[6] *See id.*; *see also regulatory Issues Arising from the Deployment of Global Mobile Personal Communication Systems: A Discussion Paper by I-CO*, World Telecommunications Advisory Committee, Honolulu, Hawaii (Jan. 18, 1996). A later version of this paper was also submitted to the FCC as part of its Jan. 26, 1996 Satellite Roundtable meeting.

[7] *U.S. Policy Forum Contribution* at 5.

genuinely open to international companies, will yield rewards for everyone whether they are in Africa, Asia, Europe or the Americas.[8]

C. The International Nature Of Global MSS

Global MSS systems, by virtue of their inherently international nature, require national regulators such as the FCC to adopt an international perspective when establishing licensing and market access rules. As explained more fully below, global MSS systems are substantially similar for regulatory purposes These systems all will: (1) provide similar types of services to consumers; (2) rely on an international investor base in financing their projects; and (3) seek partnerships with service providers and investors in countries around the world to secure any necessary licenses and authorizations for mobile satellite services.[9]

The FCC's proposed regulatory scheme for MSS ignores these similarities and instead differentiates between U.S.-licensed systems and systems licensed by other countries. This "foreign" versus "domestic" distinction, however, is purely artificial. The Big LEO systems already licensed in the United States are "domestic" only to the extent that the United States serves as their ITU notifying administration and they received their space segment license from the FCC. With respect to their coverage and operations, their levels of investment from outside the United States, their association with international service providers, and the manner in which they wish to be treated by regulators in all markets worldwide, the Big LEO systems – like all MSS systems – are "international" in character.

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[8] *ICO Chairman Calls For Deregulation of World's Telecom Markets*, ICO Global Communications News Release (May 29, 1996).

[9] *See Gore G-7 Remarks* ("Every one of the low earth orbit satellite systems — and, in addition, the intermediate-orbit Inmarsat-P affiliate — is multinational, and each satellite consortium welcomes and actively seeks out the participation of both developed and developing countries.").

By imposing the ECO-Sat test[10] on ICO, but not on its U.S.-licensed Big LEO competitors, the Commission arbitrarily will give three global MSS operators a competitive advantage over another global MSS operator. The effect of this action, as described more fully below, will be to hinder rather than promote fair competition — to the detriment of consumers and the public interest. To the extent that governments or regulatory agencies of other countries take into account the United States' regulatory approach to market access and view such discriminatory treatment as protectionist, the FCC also risks triggering similarly discriminatory measures in other countries, which might well inhibit U.S.-licensed satellite operators' access to international markets. Accordingly, the FCC should carefully consider the worldwide ramifications of failing to establish regulatory parity for all global MSS providers in the United States.

II. ICO SUPPORTS THE PROCEDURAL FRAMEWORK PROPOSED IN THE NPRM

A. The Commission Should Not Require Licenses For Non-U.S.-licensed Space Stations

ICO supports the Commission's tentative conclusion that requiring non-U.S.-licensed systems to obtain space station licenses from the United States would be redundant, time-consuming, wasteful, and contrary to the public interest.[11] ICO further supports the

[10] ICO uses the term "ECO-Sat" herein to refer to the Commission's proposed ECO-Sat test generally, in both its route-by-route and "critical mass" forms. In those instances where we mean to address only one form of the test, we specifically refer to that form.

[11] *See* NPRM at ¶ 14. Although the Commission's conclusion not to require redundant licensing for non-U.S.-licensed satellites appears clear in paragraph 14, some language in paragraph 16 suggests that space segment licensing might be necessary with respect to certain systems, namely GEO systems. *Id.* at ¶ 16. If the Commission intends to suggest that FCC licensing might be required for such services, ICO urges the Commission to clarify that U.S. licensing of non-U.S.-licensed satellites is intended to apply only to GEO systems

Commission's proposal to regulate instead the licensing of earth stations that communicate with non-U.S.-licensed satellites. Because non-U.S.-licensed space segment will be fully subject to the jurisdiction of other notifying administrations, FCC licensing of space segment is unnecessary and inappropriate. Moreover, the Commission's proposed approach is consistent with long-established laws and practice concerning satellite communications systems serving more than one country. The Astra system, operated by Societe Europeene des Satellites, for example, is licensed in Luxembourg, but serves essentially all of Europe.[12]

The licensing of U.S. earth stations communicating with non-U.S.-licensed satellites, rather than the space stations themselves, would reasonably allow the FCC sufficient oversight to ensure the orderly and efficient use of the spectrum and compliance with necessary technical standards. Regulation of communications via non-U.S. satellites through this process will allow the Commission to assess applications on a case-by-case basis and determine whether grant of a license would serve the public interest. This procedural framework is consistent with a light-handed regulatory approach that will best foster the development of competitive global MSS.[13]

B. The Commission Should Consider Non-U.S.-licensed Satellite Applications Contemporaneously With U.S.-licensed Space Station Applications In Processing Proceedings

ICO strongly supports the Commission's proposal that *all* potential applicants for a frequency band, regardless of whether their service links would be licensed through their space

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and not to MSS systems. Such clarification would be consistent with paragraph 47 of the NPRM, in which the Commission tentatively concludes not to extend regulation of MSS beyond earth station licensing. *See id.* at ¶ 47.

[12] *See* Cable & Satellite Yearbook 1995 at 55. *See also "Astra's star turn,"* 47 International Management 40 (Oct. 1992).

[13] ICO also supports the Commission's proposal not to require the owners of a non-U.S.-licensed system to hold the Title III licenses issued to the earth stations that communicate with that system. ICO also agrees that the Commission need not address issues of foreign ownership regarding non-U.S.-licensed space stations that seek U.S. market access.

segment or their end-user terminals, be included in U.S. proceedings and negotiations regarding access to and use of frequencies. To do otherwise would, as the Commission recognizes, "effectively foreclose later entry" for non-U.S.-licensed systems.[14]

ICO also supports the Commission's tentative decision to include only those non-U.S.-licensed systems that meet one of three conditions: "(1) the space station is in orbit and operating; (2) the space station has a license from another administration; or (3) the space station has been submitted for coordination to the ITU and is pursuing a license with another administration."[15] ICO agrees that application of these conditions will adequately accommodate legitimate non-U.S.-licensed system applicants while preventing the overcrowding of processing rounds with frivolous applications.

III. THE ECO-SAT TEST CONFLICTS WITH COMMISSION ACTIONS LIMITING ITS AUTHORITY TO REGULATE TRADE

A. The ECO-Sat Test Is A Reciprocal Restriction On Trade Policy

Although the NPRM never identifies it as such, the Commission's ECO-Sat proposal is a reciprocal trade policy restriction on U.S. market access. By barring U.S. market access for satellite systems licensed in other countries on the basis of reciprocal regulatory treatment in foreign markets, the Commission's ECO-Sat test, whether applied as a route-by-route or "critical mass" analysis, establishes a trade reciprocity standard. As such, the Commission's proposal exceeds the agency's authority and contradicts Commission precedent. As several commenters argued in the proceeding that established the original "effective competitive opportunities"

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[14] NPRM at ¶ 16.

[15] *Id.* Because many national administrations do not issue licenses *per se* to the space segment operators for whom they serve as ITU notifying administrators, ICO urges that conditions (2) and (3) be extended to include the pursuit or possession of a license or a similar authorization.

("ECO") test,[16] imposition of a reciprocity standard would require the Commission to infringe on Executive Branch jurisdiction over trade policy.[17]

In the Commission's *Market Entry Order*, which adopted the precursor to the ECO-Sat test, the Commission responded to these jurisdictional and trade policy arguments by asserting that the effective competitive opportunities analysis was *not* a "reciprocity" standard. Rather, the Commission argued, the order adopted a "public interest analysis that is comprised, in part, by an effective competitive opportunities analysis" and is applied "not to secure open markets as an end in itself, but rather to ensure that U.S. consumers and businesses realize the benefits of effective competition in the provision of their international telecommunications services."[18]

Regardless of the Commission's stated intent behind the application of an ECO or ECO-Sat test, the effect of such an analysis will be to impose a trade reciprocity condition on international telecommunications services. Application of the proposed ECO-Sat test, particularly under a "critical mass" scheme, would undermine the Executive Branch's ability to preserve a unified and coherent trade policy that is tailored to the individual circumstances of particular market conditions.

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[16] *See Market Entry and Regulation of Foreign-affiliated Entities*, 11 FCC Rcd 3873 (1996) ("*Market Entry Order*").

[17] Several commenters in the *Market Entry* proceeding challenged the Commission's authority to impose the ECO analysis. *See, e.g., Comments of Telefonica Larga Distancia de Puerto Rico, Inc.*, filed Apr. 11, 1995, at 5-19 ("*Telefonica Comments*"); *Comments of Deutsche Telekom AG*, filed Apr. 11, 1995, at 4-22 ("*Deutsche Telekom Comments*"). Although not a commenter in the original ECO proceeding, ICO similarly questions the FCC's authority to apply the ECO test to license applicants subject to the *Market Entry Order*. In ICO's view, both the ECO and ECO-Sat tests constitute reciprocity standards implicating international trade policy and improperly usurp Executive Branch authority. ICO notes that the *Market Entry Order* is subject to a number of petitions for reconsideration and could be subject to court review on a variety of grounds, including the jurisdictional issues discussed above.

[18] *Market Entry Order* at 3959.

B. Application Of The ECO-Sat Test Would Usurp Executive Branch Authority Over Matters Of International Trade

Pursuant to the 1974 Trade Act[19] and 1988 Telecommunications Trade Act,[20] the Executive Branch is charged with the authority to establish international trade policy. Under Section 301 of the Trade Act of 1974, the President and U.S. Trade Representative ("USTR") are responsible for implementing retaliatory measures regarding trade in services.[21] As an independent agency, the FCC may not usurp this role. Similarly, the 1988 Telecommunications Trade Act grants the USTR jurisdiction to retaliate against the unfair trade practices of foreign countries in the trade of telecommunications services.[22]

Confronted with the Executive Branch's well-recognized statutory authority over trade policy matters, the Commission has concluded on at least two occasions that it lacks the authority to apply reciprocity standards analogous to the ECO-Sat test proposed in this proceeding. In *Regulatory Policies and International Telecommunications* ("*Regulatory Policies*"), the Commission sought comment on whether it should impose limitations on U.S. market access for foreign-owned telecommunications service providers and equipment manufacturers from jurisdictions that are "closed" to U.S. service providers and equipment manufacturers.[23]

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[19] 19 U.S.C. §§ 2411-2420 (Supp. 1996).

[20] 19 U.S.C. §§ 3101-3111 (1988).

[21] *See* 19 U.S.C. § 2411 (Supp. 1996).

[22] *See, e.g.,* 19 U.S.C. § 3106(c). *See also Telefonica Comments* at 11-12; *Deutsche Telekom Comments* at 19-22. Also, in passing the 1988 Telecommunications Trade Act, Congress made clear that it did not intend to require "that foreign telecommunications markets be a mirror image of the U.S. market." H. Conf. Rep. No. 576, 100th Cong., 2nd Sess. 641 (1988), *reprinted in*, 1988 U.S.C.C.A.N. 1547, 1674.

[23] *See Regulatory Policies and International Telecommunications*, Notice of Inquiry and Proposed Rulemaking, 2 FCC Rcd 1022, 1022 (1987).

In its comments to the Commission in that proceeding, the Executive Branch vigorously opposed the notion of an independent agency such as the FCC undertaking such unilateral initiatives in the trade policy field:

> Under section 301 of the Trade Act of 1974, as amended (19 U.S.C. Sec. 2411 (1984)), the President can implement retaliatory measures on services after the U.S. Trade Representative consults with independent regulatory agencies, including the FCC, as appropriate. Existing law, however, provides no authority for the FCC to take unilateral retaliatory action and, indeed, the whole notion of any such unilateral action by the FCC is inimical to the plain need for consistency in developing and implementing U.S. trade policy.[24]

The Executive Branch comments explained that existing law and trade policy require that any FCC action affecting U.S. trade policy "must be consistent with the following fundamental principles":

> (1) First, the U.S. must tailor its overall responses to foreign country practices to the nature and severity of those practices, the relationships with the countries involved, the extent of U.S. direct equity participation in the foreign market and foreign nationals' investments here, the status of regulatory and legislative efforts in individual countries, and U.S. international obligations. All of these factors, combined with sensitive ongoing bilateral and multilateral negotiations, must be synthesized into a coherent U.S. trade policy by the Executive branch agencies specifically charged with such responsibility.
>
> (2) Second, with respect to actions taken to respond to foreign practices, any such action taken as a result of information gathered by the FCC must be undertaken by the Executive branch under the authority of Section 301 of the Trade Act of 1974 or any other relevant statutes. This approach enables the U.S. to maintain a unified trade policy and the Executive branch to continue to exercise its responsibility for conducting trade and foreign policy of the United States.[25]

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[24] *Comments of the National Telecommunications and Information Administration on Behalf of the U.S. Department of Commerce*, filed Apr. 17, 1986 at 5 ("*Executive Branch Comments*"). These comments were coordinated with the Office of the U.S. Trade Representative, the Office of Management and Budget, the Council of Economic Advisers, and the Departments of State, Treasury, and Labor.

[25] *Id.* at 8.

Citing the concerns expressed by the Executive Branch, the Commission did not adopt its reciprocity proposal.[26] For the same reasons, the FCC should not adopt a reciprocity standard for non-U.S.-licensed satellite services. If implemented, the ECO-Sat test would constitute a unilateral retaliatory trade policy initiative that fails to conform with the fundamental principles outlined above and infringes on the Executive Branch's authority to impose retaliatory measures on services.[27]

The "critical mass" test proposed for MSS constitutes an especially egregious violation of the fundamental principles articulated by the Executive Branch. By encompassing several countries, the "critical mass" test would severely frustrate the Executive Branch's desire to synthesize a coherent U.S. trade policy that is sensitive to the unique characteristics of individual market contexts. The "critical mass" test could deny customers in Country X from communicating with the United States via a non-U.S.-licensed MSS satellite because of the regulatory policies of *other* countries, despite the fact that Country X's own market may be *fully open* to U.S.-licensed MSS operators.[28] A test that punishes all the countries of the world because of the policies of a few — or even one — clearly would violate the principles outlined above requiring that agency actions affecting trade policy be sensitive to particular countries' practices, their environments, and their trade contexts.

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[26] *See Regulatory Policies and International Telecommunications*, CC Docket No. 86-484, Report and Order and Supplemental Notice of Inquiry, 4 FCC Rcd 7387, 7396 (1988).

[27] Furthermore, the Commission has yet to produce any evidence that retaliatory measures are even necessary in the context of MSS.

[28] It would also be perceived, rightly, by Country X as arbitrary and inequitable. This, in turn, could adversely affect the foreign relations of the United States in general, another area for which the Executive Branch has indisputable responsibility.

The second context in which the Commission considered and rejected a reciprocity condition involved the foreign ownership of cable television systems. In the *Second Cable Foreign Ownership* proceeding ("*Second Cable*"),[29] the Commission explicitly addressed the question of "the proper role of the Commission with respect to issues of international trade and reciprocity among nations." The Commission concluded:[30]

> We do not believe a desire for reciprocity in international investment policies by itself provides an adequate basis for action on our part. Nor are we, in any case, in a position to know if such a policy on our part would in fact have the result intended or if, to the contrary, it would lead to increasing trade barriers in other areas.[31]

Importantly, the Commission noted:

> Which of these policies is the appropriate one in this situation is obviously a matter that does not come within the sphere of the ordinary concerns of this Commission. It is a matter which we believe is appropriately considered by other branches of the government.[32]

In both the *Regulatory Policies* and *Second Cable* proceedings, the Commission prudently recognized that an independent agency should not impose a reciprocity condition on international trade and investment in services. In the *Market Entry Order*, the FCC departed from this precedent and imposed the ECO standard based on its incorrect assertion that the ECO test is not a reciprocity standard. ICO urges the Commission to follow the precedent established in *Regulatory Policies* and *Second Cable*, rather than *Market Entry*, as the proper interpretation of the Commission's trade authority. Like the measures contemplated in *Regulatory Policies* and

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[29] *See Amendment of Part 76 and 78 of the Commission's Rules to Adopt General Citizenship Requirements for Operation of Cable Television Systems and for Grant of Station Licensees in the Cable Television Relay Service*, Memorandum Opinion and Order, 77 FCC 2d 73 (1980) ("*Second Cable*").

[30] *Second Cable*, 77 FCC 2d at 78.

[31] *Id.* at 79.

[32] *Id.*

Second Cable, the ECO-Sat test, particularly in its "critical mass" form, is a unilateral trade policy initiative outside the proper role of the FCC.

IV. THE ECO-SAT TEST CONFLICTS WITH GENERAL INTERNATIONAL TRADE POLICIES AND THE U.S. POSITION IN THE ONGOING TRADE NEGOTIATIONS

The Commission's proposed actions in the NPRM are inconsistent not only with U.S. trade policy, but international trade principles as well. Furthermore, the ECO-Sat test contradicts the United States' pro-competitive and pro-open market access stance in multilateral fora, including the WTO's ongoing negotiations concerning competitive opportunities in the provision of telecommunications services.

A. Adoption Of The ECO-Sat Test Would Violate The "Standstill" Provision Agreed To By The United States and Other Countries In Establishing The Negotiating Group On Basic Telecommunications

In establishing the Negotiating Group on Basic Telecommunications ("NGBT")[33] in 1994 as the mechanism for negotiating global trade agreements for telecommunications, the United States and the governments of other WTO member counties agreed to a "standstill" provision. This provision states that no participant in the NGBT "shall apply any measure affecting trade in basic telecommunications in such a manner as would improve its negotiating position and leverage."[34] The ECO-Sat test, if adopted, would violate this principle by dramatically increasing U.S. bargaining power in the ongoing NGBT talks (or, at least, it would do so prior to the inevitable counter-moves by other countries). Parties to the negotiations would come to the

[33] Although the NGBT recently was renamed the Group on Basic Telecommunications, we continue herein to refer to NGBT.

[34] Decision on Negotiations on Basic Telecommunications, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts, (Geneva, 1994) at 461-62.